

# Complacency and Constitutional Law

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*It's still the same old story,  
A fight for love and glory  
A case of do or die. . . .  
The fundamental things apply.  
As time goes by.*

We yearn for blind and disembodied Justice. Yet we also expect and quietly hope that in the end, in a vital case, a great Justice will let the mask slip just a bit. We expect the Court to be tough and neutral and above the fray—but we also want it to come through in the crunch. In other words, we assign to the court the Bogart role in “Casablanca.”

“Casablanca,” in fact, illuminates significant issues in contemporary constitutional theory. Through its flickering light,<sup>1</sup> it is possible to focus essential problems of discrimination and representation which figure prominently, but are not resolved, in the works of John Hart Ely and Jesse Choper discussed in this Symposium. The mechanistic treatment of perplexing issues of democratic theory in *City of Mobile v. Bolden*<sup>2</sup> provides the counterpoint to three central themes encapsulated in “Casablanca.” These three are: the Ahistorical Stance, the Neutral Pose, and the Dilemma of the Unexplained Happy Ending.

There may be bookish souls who stay confined within the four corners of their constitutional texts and do not get to the movies very often. I will briefly review “Casablanca” for them. Humphrey Bogart plays Rick, the proprietor of the Café Américain” in Casablanca early in World War II. The plot of the movie is triggered when a sleazy character named Ugarte, played by Peter Lorre, entrusts two letters of safe transit to Rick. Rick promptly refuses to intervene when the Vichy police take Ugarte away to his death. In fact, Rick appears to be so neutral that he will not intervene for anyone in anything.

The letters of transit in Rick’s possession are the only way to escape from Casablanca for those who lack “money, or influence, or luck.”<sup>3</sup> Otherwise

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1. Several confessions are in order here, in the place where it is now *de rigueur* to include a lengthy list of acknowledgments. First, one of the places of refuge I found during what some of the faculty believed to be “the Dark Ages” at the Yale Law School in the late 1960s and early 1970s was the basement, where the directors of the Yale Law School Film Society screened films before we showed them. In that dark room, one could not spend much time reading casebooks. Second, I am married to a documentary filmmaker. Marlene Booth has helped me to see many things. I also have become acutely aware of how much the camera and the editing process can create as well as reflect reality.

2. 100 S. Ct. 1490 (1980).

3. H. KOCH, CASABLANCA: SCRIPT AND LEGEND 31 (1973). This thirtieth anniversary volume, put together by the man who claims main credit for the script of “Casablanca,” is but one of several volumes that reprint the script. For another, replete with scene-by-scene pictures, see R. ANOBILE, CASABLANCA (1974). In an effort to avoid the bogeyman of a new footnotes-to-page ratio record, I will not (hereinafter) cite specific quotations from “Casablanca.”

there is no hope, and everyone must “wait, and wait, and wait, and wait . . .” since in Casablanca “the Germans have outlawed miracles.” Under Vichy, Casablanca is ruled by the strictest laws of supply and demand; its religion is the harshest sort of Social Darwinism; it is a market place of everything and everyone. Except for Rick. Something in Rick’s past makes him different—apparently above it all. He seems not to care about anything, not even about money. So everybody goes to Rick’s place for entertainment, but anybody who wants results must go to the Blue Parrot to see Ferrari (Sydney Greenstreet), who is lord of the black market.

Ilsa, played by Ingrid Bergman, shows up at the Café Américain. She is accompanied by the song, “As Time Goes By,” and by Victor Laszlo (Paul Henreid), a heroic leader of the Resistance. Laszlo needs the letters of transit if he is to escape Casablanca to carry on the fight against the Nazis. But Ilsa and Rick were “romantically involved” in Paris, as the Germans marched in. The film’s central question is whether anyone will get the charmed letters of transit, and with them a plane ride to Portugal and freedom. Can anything or anyone pull Rick off his high, neutral barstool? Will he intervene?

## I. THE THREE THEMES: MOVIE VERSION

### A. *The Ahistorical Stance*

The romance of the Ahistorical Stance is essential to the way Rick behaves in Casablanca. No one knows why Rick lives by his own peculiar rules nor why he landed in Casablanca. There is reason to doubt his explanation that he came to Casablanca for the waters.

In a flashback, it becomes clear that the unexplored past was basic to the way things were when Rick had Paris and Ilsa. In fact Rick could have lost Ilsa *ab initio*, as it were, with the following indiscretion:

*Rick:* Who are you, really? And what were you before? What did you do and what did you think? Huh?

*Ilsa:* We said “no questions.”

*Rick:* Here’s looking at you, kid.

Fortunately, Rick’s immortal comeback saves the day; love and Paris triumph, to be recaptured somehow in Casablanca. The unexamined past is what makes Paris worth loving.

### B. *The Neutral Pose*

The Neutral Pose is just that—a pose. No matter how much Rick protests that he is above or beneath the battle, we suspect—as do the Nazis; the Vichy police commandant, Captain Renault; and Victor Laszlo—that Rick did not just happen to fight for the Loyalists in Spain and that he did not run guns to Ethiopia merely because he was paid. Rick’s lapses from neutrality provide

some of the best moments in the movie. With a nod, Rick allows the band to play "La Marseillaise" to overwhelm "Deutschland Über Alles." He silently orders that the roulette game be rigged so that a young woman may avoid Captain Renault's devilish bargain in exchange for her escape.

All the while, of course, Rick claims—in lines delivered in the best, gruffest Bogartese—that he has no sympathy for any side. He explains, "I understand the point of view of the hound" as well as that of the fox. Captain Renault informs Colonel Strasser, the Nazi commander, "Rick is completely neutral about everything. And that takes in the field of women, too."

Rick's Ahistorical Stance is somewhat in tension with his Neutral Pose. Together they are supposed to explain his aggressive isolation from the issues which surround him. Through them, we are compelled towards the wonderful, Unexplained Happy Ending.

### C. *The Unexplained Happy Ending*

We really never figure out why Victor Laszlo gets both the letters of transit and Ilsa. In fact, recent scholarship<sup>4</sup> discloses that writer, director, and actors did not know who would be on the plane, even as they filmed "Casablanca." Their uncertainty went so far as to prepare to shoot two different endings.

We in the audience are content as we leave the theater. But we remain in the dark about whether Rick finally chooses sides as he does because of his respect for Laszlo, his belief in Laszlo's cause, his memories of Ilsa as his old lover, his renewed love for Ilsa, or aspects of all of the above. We do know that Rick is willing to resort to a noble lie to save Ilsa's honor and to get Laszlo and Ilsa safely aboard the plane to freedom. But he is also not above the start of a beautiful friendship with Captain Renault, who advertises himself as a man without scruples. We learn that Rick will get involved and that he does believe in something. Neither the film nor the audience can explain the happy ending fully. But we know it fits and we are willing to accept a bit of untidiness.

## II. THE THREE THEMES: CONSTITUTIONAL VERSION

*City of Mobile v. Bolden* is a watershed case. It exemplifies much of the confusion and complacency in the current Court's approach to basic issues of constitutional theory. In the course of the six separate opinions

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4. H. KOCH, *CASABLANCA: SCRIPT AND LEGEND* 22-25 (1973) (roughly half the script not written when shooting began; a dead heat during shooting, with scenes brought to the set the day they were to be shot); I. BERGMAN & A. BURGESS, *INGRID BERGMAN: MY STORY* (1980) (two different endings for "Casablanca" actually to be filmed).

by the Justices,<sup>5</sup> the Ahistorical Stance and the Neutral Pose prevail. But a majority of the Court scrupulously avoids the dangers of any Happy Ending which cannot be fully explained.

In *Bolden*, the Court rejects a claim by black citizens that they are denied their "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."<sup>6</sup> The plaintiffs in *Bolden* assert that the votes of the black citizens of Mobile, who constitute slightly over one-third of the population of the city, are diluted unconstitutionally by Mobile's at-large system of electing the three city commissioners who govern the city. This claim of discrimination through vote dilution, in an election scheme established in 1911, was sustained by the district court after lengthy fact-finding<sup>7</sup> and by the U.S. Fifth Circuit Court of Appeals.<sup>8</sup> In companion

5. The Court appears to be continuing its move back toward an earlier tradition of *seriatim* opinions. In *Bolden*, Justice Stewart writes for the plurality, joined by Chief Justice Burger and Justices Powell and Rehnquist. Justices Blackmun and Stevens each concur separately. Justices White and Marshall dissent at length, while Justice Brennan contributes a brief dissent which agrees with parts of each of the opinions of his fellow dissenters.

6. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). In *San Antonio School District v. Rodriguez*, 441 U.S. 1 (1973), Justice Powell for the majority referred to "the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population." *Id.* at 35 n.78. He asserted: "[T]he right to equal treatment in the voting process can no longer be doubted." *Id.* at 34 n.74. Justice Stewart, concurring, argued that the Equal Protection Clause creates no substantive rights, with one notable exception: "the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population." *Id.* at 59 n.2.

In *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 (1969), Chief Justice Warren summed up the voting rights ideal of the 1960s; he described the need to abandon traditional deference and to replace it with careful scrutiny "to determine whether each resident citizen has, as far as is possible, an equal voice" in the selection of legislators and other public officials.

7. The district court opinion, by Chief Judge Virgil Pittman, is at 423 F. Supp. 384 (S.D. Ala. 1976). This veteran of fifteen years on the Alabama state court bench made detailed findings to support his general conclusion that: "[T]he structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected." *Id.* at 389. For example, Judge Pittman relied upon regression analysis of election patterns, and took testimony from "practically all active candidates for public office" to the effect that "it is highly unlikely that anytime in the foreseeable future, under the at-large system, a black can be elected against a white." *Id.* at 388. He found "the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing city commissioners." *Id.* at 393. His other findings included, "a singular sluggishness and low priority in meeting . . . particularized black neighborhood needs when compared with a higher priority of temporary allocation of resources when the white community is involved." *Id.* at 392. Chief Judge Pittman emphasized that when the format of election to the Alabama legislature was changed by court order to single-member districts, it significantly altered a pattern that "whenever a redistricting bill of any type is proposed . . . a major concern has centered around how many, if any, blacks would be elected." *Id.* at 397. The single-member district increased the numbers of blacks in the House delegation. Chief Judge Pittman found the *Washington v. Davis* test of discriminatory motive to be met, and added that the City of Mobile maintained "a political system that grants citizens all procedural rights while neutralizing their political strength," citing *White v. Regester*, 412 U.S. 755 (1973). *Id.* at 399.

A few of the district court's findings appear forced. Chief Judge Pittman's occasional reference to his personal views and experience are unusual. But his findings and his opinion reveal careful consideration of a multitude of local factors. He portrays a local reality of racial polarization and lack of responsiveness to black citizens, frozen by an electoral system which may have been formally "race-proof" in origin but which has been intentionally and foreseeably continued to deny "every citizen . . . an inalienable right to full and effective participation in the political processes," *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). "423 F. Supp. 384, 398 (S.D. Ala. 1976).

8. The Fifth Circuit opinion affirming Chief Judge Pittman's opinion in *Bolden* is at 571 F.2d 238 (5th Cir. 1978). It is scrupulous in its attention to details of law and fact. That the Fifth Circuit was not engaged in wild-eyed judicial activism or uncritical solicitude for the claims of all black plaintiffs is obvious throughout the

cases, the same Fifth Circuit panel reversed or remanded two other district court holdings which accepted less convincing voting dilution claims.

The essential claim in *Bolden* is that the racially polarized bloc voting in Mobile, exacerbated by several elements of the 1911 election format, freezes black citizens out of the political community. This is compounded by the fact, as found by the lower courts, that Mobile is unresponsive to the claims of black citizens for municipal services, employment, and similar ordinary governmental functions. The plaintiffs maintain that they are now, and long have been, a discrete and insular minority even though they no longer suffer formal disenfranchisement.

The *Bolden* decision is startling in part because it does not involve the traditional problem of who gets included when the Court rounds up the usual suspects. The *Bolden* plaintiffs are the archetypal *Carolene Products* footnote four<sup>9</sup> "discrete and insular minority." They make the paradigmatic claim about lack of political access. It is clear from the Court's rejection of their claim that it is a long way from Memphis to Mobile.<sup>10</sup> *Bolden* is a dramatic bookend to the volumes written in pursuit of equal rights in the quarter-century since *Brown v. Board of Education*.<sup>11</sup>

In the *Bolden* plurality opinion, Justice Stewart supplies variations on his own elaboration of the theme introduced in *Washington v. Davis*.<sup>12</sup> He further rigidifies the central role of a strict discriminatory purpose test for fourteenth and fifteenth amendment analysis.

In *Washington v. Davis*, the Court determined that discriminatory motive, which the Court had only recently insisted should not play a significant role in equal protection adjudication,<sup>13</sup> was to be the necessary condition

opinion, and is confirmed by the same panel's decision to reverse District Judge Pointer in a similar voter dilution claim from Fairfield, Alabama in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978). In both cases, Judge Tjoflat's opinions were joined by Judge Simpson, and accompanied by vigorous "special concurrences" by Judge Wisdom. These two cases, as well as the two companion cases, *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978) (district court reversed for inadequate findings to support decision to uphold vote dilution claim), and *Thomasville Branch of N.A.A.C.P. v. Thomas County, Georgia*, 571 F.2d 257 (5th Cir. 1978) (district court reversed, and remanded with instructions that maintenance as well as origination of districting plan might constitute discriminatory motive), illustrate the Fifth Circuit's conscientious attempt to apply *Washington v. Davis*, and the multi-factor test contained in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

We can tell it is a different constitutional world from what it has been over the past quarter-century when trial judges and appellate judges in the Fifth Circuit are reversed by the Supreme Court for *upholding* the claims of blacks.

9. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

10. The citizens of Tennessee who lived in Memphis were among those most grossly affected by the malapportionment struck down in *Baker v. Carr*, 369 U.S. 186 (1962). That some Alabama citizens suffered similarly was made evident in *Reynolds v. Sims*, 377 U.S. 533 (1964). See also *Watson v. Memphis*, 343 U.S. 526 (1963).

11. 347 U.S. 483 (1954). *Bolden* is a particularly useful test of John Ely's representation-reinforcing theory. It is as if it poses the next problem for Ely. But I will not cite specific points of congruence with *Democracy and Distrust* for several reasons. They include: too many footnotes already; a Symposium in which many others discuss Ely's work with skill and detail; the fact that Ely was generous enough to include me in his Acknowledgements and my belief that a recusal is therefore in order.

12. 426 U.S. 229 (1976).

13. *Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971). See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

for any equal protection claim. As innovative as its conclusion might have been, however, *Washington v. Davis* suggested that discriminatory motive could be demonstrated in a variety of ways. The thrust of Justice White's majority opinion was that racial discrimination could be proved through a totality of the circumstances approach. This appeared to include the naturally foreseeable consequences of official action, and it allowed consideration of significant racially disproportionate effects as a starting point.<sup>14</sup> It was on this basis that the Fifth Circuit specified and followed a multi-factor test for racial discrimination in the voting dilution context in *Bolden*.<sup>15</sup>

What Justice Stewart did for the majority in the context of a sex discrimination claim in *Personnel Administrator of Massachusetts v. Feeney*,<sup>16</sup> he does for the plurality in the racial and voting context in *Bolden*. Justice Stewart maintains that discriminatory purpose, which is a necessary predicate, is demonstrable only through proof that a challenged action was undertaken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>17</sup>

Justice Stevens pursues several of his personal favorite themes in his concurring opinion. He argues that a distinction may and should be drawn between discrimination against individuals *qua* individuals and discrimination against individuals as members of groups.<sup>18</sup> He asserts further that discriminatory motive is neither necessary *nor sufficient* to prove an equal protection violation.<sup>19</sup>

In a brief opinion concurring in the result, Justice Blackmun emphasizes the remedial problems inherent in the broad scope of the district judge's restructuring of the city government processes.<sup>20</sup>

The author of *Washington v. Davis*, Justice White, dissents vigorously from the plurality's application of the discriminatory motive test elaborated in that decision. He emphasizes those sections of his *Washington v. Davis* opinion which suggested that discriminatory motive could be proved by in-

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14. 426 U.S. 229, 241-42 (1976).

15. The Fifth Circuit's multi-factor approach, based on *Washington v. Davis*, is most clearly articulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd. sub. nom.* *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

16. 442 U.S. 256 (1979).

17. 100 S. Ct. 1490, 1502-03, n.17 (1980), *quoting* 442 U.S. 256, 279 (1979).

18. Justice Stevens suggests that "there is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community." *Id.* at 1508. For similar and somewhat strange individual versus group distinctions by Justice Stevens in both constitutional and statutory contexts, *see, e.g.*, *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2803 (1980) (Stevens, J., dissenting) ("The economic consequences of using noble birth as a basis for classification in 18th century France, though disastrous, were nothing as compared with the terror that was engendered in the name of 'egalite' and 'fraternite.'"); *Los Angeles Dep't of Water & Power v. Manhart*, 425 U.S. 702 (1978). *But see* *Caban v. Mohammed*, 441 U.S. 380, 404-07 (1979) (Stevens, J., dissenting with Burger, C. J. and Rehnquist, J.).

19. 100 S. Ct. 1490, 1512 (1980).

20. *Id.* at 1507-08. That Justice Blackmun's concurrence is dependent upon his sense of remedial overreaching is further indicated by his separate concurrence in the *per curiam* remand of a companion case to *Bolden* involving the process of election of the school board in Mobile, *Williams v. Brown*, 100 S.Ct. 1519 (1980). For further developments in that case, *see* *Moore v. Brown*, 101 S. Ct. 16 (1980) (in-chambers opinion) (Powell, J.).

ference from the totality of relevant facts. Justice White appears disturbed by the plurality's decision to reverse the "meticulous factual findings and scrupulous application of the principles"<sup>21</sup> of the relevant cases by the lower courts. He also argues that the plurality abandoned the general approach the Court recently had taken in voting dilution decisions.<sup>22</sup>

Justice Brennan writes separately, agreeing with Justice White that discriminatory purpose was demonstrated in *Bolden* and joining Justice Marshall in arguing that discriminatory purpose should not be a necessary element for either fourteenth or fifteenth amendment analysis.<sup>23</sup>

Justice Marshall's dissent nearly burns the pages on which it is written. It contains the accusation that "[i]t is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination."<sup>24</sup>

Justice Marshall ends his dissent—released just before the 1980 eruption of racial violence in Miami—with the warning that a "superficial tranquility" created by the "impermeable" and "specious" requirement of intentional discrimination might prove short-lived: "If this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination,' it cannot expect the victims of discrimination to respect political channels of seeking redress."<sup>25</sup>

It is as if in 1980 black citizens no longer constitute a discrete and insular minority. A black citizen's constitutional claim will not prevail unless he can demonstrate precise intentional discrimination against himself as an individual or some specific and intentional official discriminatory treatment of blacks. Otherwise, the promise of the fourteenth and fifteenth amendments, and the civil rights revolution, has either been satisfied or is properly left to the politicians. As we enter the 1980s, it is presumed that we all compete fairly. When no bad guys can be connected to evil discriminatory deeds, the Court apparently simply assumes that we all enjoy equal and fair opportunity.

It is forgotten, but not insignificant, that the group that Justice Stone identified first in his *Carolene Products* footnote as in need of special judicial

21. *Id.* at 1514. It must be conceded that Justice White himself has not been entirely consistent in the application of the kind of wide-ranging inquiry into historical facts and local practices to prove discriminatory motive which he urges here. For example, Justice White joined the majority in *James v. Valtierra*, 402 U.S. 137 (1971) and *Jefferson v. Hackney*, 406 U.S. 535 (1972). In consideration of related matters, he joined in Justice Rehnquist's majority opinion in *Rizzo v. Goode*, 423 U.S. 362 (1976), and he wrote the majority opinion in *O'Shea v. Littleton*, 414 U.S. 488 (1974). Also revealing is Justice White's narrow view of what would constitute a legitimate defense to a claim of discriminatory motive in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 273 (1977)(dissenting to urge remand). Justice White's opinions concerning discriminatory motive in cases which involve racial discrimination claims and the vote do appear internally consistent. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). Cf. *Beer v. United States*, 425 U.S. 130, 143-45 (1976)(White, J., dissenting).

22. 100 S. Ct. 1490, 1517-18 (1980). See note 122 *infra*.

23. 100 S. Ct. 1490, 1520 (1980).

24. *Id.* at 1540.

25. *Id.*

concern were those persons without sufficient access to "those political processes which can ordinarily be expected to bring about *repeal* of undesirable legislation."<sup>26</sup>

That legislation already on the books might be particularly difficult to repeal seemed obvious and important in 1938. The Court now appears confident that, as a constitutional matter, whatever law is in place ought to remain there. The only exception seems to be for cases which involve overwhelming demonstration of the most blatant form of discriminatory motive. Political reality, believed to be biased or excessively difficult to change four decades ago, is now presumed to be fair. Racial minorities burdened by "undesirable legislation" must seek its repeal without judicial assistance.

What brought about this change? The unarticulated source of this altered constitutional consciousness is probably the Voting Rights Act of 1965.<sup>27</sup> Goaded by the civil rights movement, by dramatic events in Selma, Alabama, and by Lyndon Johnson at his most persuasive,<sup>28</sup> Congress determined that pervasive disenfranchisement of blacks had gone on too long. Congress therefore invoked its power under the enforcement clauses of the fourteenth and fifteenth amendments to pass a Voting Rights Act which compelled sweeping reform of much of the existing electoral system. The 1965 Act depended upon extensive federal scrutiny to ensure local and state compliance.

Congress nowhere indicated that it believed its voting rights legislation superseded or preempted the constitutional protection of the right to vote. A burning constitutional question at the time concerned the scope of Congress' enforcement power. It is ironic that the Court's emphatic, repeated approval of broad congressional power<sup>29</sup> is transformed somehow into an apparent constitutional belief that congressional action is the exclusive resort, and a sufficient answer, for those who claim systemic problems within the existing political system. It is tragic if the Court believes that the goals of the Voting Rights Act, or the constitutional ideals which were its basis, already have been realized.

The Court does not have the relatively easy statutory escape route in *Bolden* that it employs in the companion case of *City of Rome v. United States*.<sup>30</sup> *City of Rome* appears to illustrate Jesse Choper's approach, in which the Court views Congress as an adequate clearinghouse for claims of the states. The Court then, in effect, can explain, "Those devils in Congress and

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26. 304 U.S. 144, 152 n.4 (1938) (emphasis added).

27. 42 U.S.C. § 1973 (1976). It has been suggested by Senator Strom Thurmond (R.-S.C.), who is about to be the chairman of the Senate Judiciary Committee, that the Voting Rights Act should be repealed. Thurmond told a reporter, "I think the states ought to pass their own laws." *Boston Globe*, November 17, 1980, at 10, col. 1.

28. See S. LAWSON, *BLACK BALLOTS* 288-328 (1976); D. KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 228-30, 304-08 (1976); M. MILLER, *LYNDON* 331 (1980).

29. See, e.g. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). *But see Oregon v. Mitchell*, 400 U.S. 112 (1970).

30. 100 S. Ct. 1548 (1980).



the Department of Justice made us do it." The Justices are able to invoke this defensive posture in *City of Rome* even as they engage in rather strained and expansive interpretation of congressional language.

In *Bolden*, however, none of the Justices chooses to debate or to elaborate upon the claim made by Justice Stewart, in his plurality opinion, that Section 2 of the Voting Rights Act is a redundant appendage to the fifteenth amendment. The fifteenth amendment, in turn, is said to contain only a "command and effect [which] are wholly negative."<sup>31</sup> Justice Stewart then reaches out to determine that the constitutional requirement of proof of purposeful discriminatory motivation applies to the fifteenth as well as to the fourteenth amendment. What his approach does to the fifteenth amendment is something akin to what Justice Miller did to the privileges or immunities clause of the fourteenth amendment in the *Slaughter-House Cases*.<sup>32</sup> The fifteenth amendment becomes surplusage; it is this court's variation on the theme of constitutional text as "but a truism."<sup>33</sup>

It is the plurality opinion by Justice Stewart which best serves to illustrate the connection of "Casablanca" to constitutional law. Justices Stewart and Stevens recently have been the primary proponents of a constitutional theory which commands general governmental neutrality. The duty of government to be neutral is thought to co-exist with a hands-off policy of judicial neutrality,<sup>34</sup> apparently constitutionally compelled. In his plurality opinion in

31. 100 S. Ct. 1490, 1497 (1980). Justice Stewart's interpretation of the fifteenth amendment and of statutes based upon it piles redundancy upon redundancy. He determines that it is unnecessary to consider the statutory claims made by the plaintiffs—but not adequately dealt with by the lower courts—because "it is apparent that the language of § 2 [of the Voting Rights Act of 1965] no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Id.* at 1496. To support this decision to proceed directly to the constitutional issue without full consideration of statutory claims, Justice Stewart cites Senator Dirksen, who said that Section 2 was "almost a rephrasing of the Fifteenth Amendment." *Id.* at 1496-97. This statement by Dirksen does not seem to be the same as the view that "this section simply restated the prohibitions already contained in the Fifteenth Amendment." *Id.* at 1496. Almost isn't good enough. This is particularly so in the context of a double redundancy inherent in Justice Stewart's statutory interpretation. A lonely remnant of the Reconstruction era statutes was, and still is, on the books as 42 U.S.C. § 1971(a), and does the same thing once more. Even if Congress were simply repeating an old statute and the fifteenth amendment, the repetition itself should have significance rather than being glibly dismissed.

Judge Wisdom's extensive discussion of Section 2 of the Voting Rights Act of 1965 in his special concurrence in *Nevett v. Sides*, 571 F.2d 209, 237-38 (5th Cir. 1978), appears far more convincing than the snippet from "Old Ev" Dirksen, which constitutes the entire reference to legislative intent in the plurality opinion.

The interpretation the plurality goes on to give the fifteenth amendment itself makes that entire amendment appear to be otiose in the context of the fourteenth amendment. See text accompanying notes 117-23, *infra*.

32. 83 U.S. (16 Wall) 36, 74 (1873).

33. *United States v. Darby*, 312 U.S. 100, 124 (1941) (description of tenth amendment). That a mere "truism" can be resuscitated quickly, and with potency, is revealed in the recent use of the tenth amendment. In 1975, while still a truism, that amendment was "not without significance." *United States v. Fry*, 421 U.S. 542, 547 n.7 (1975). A year later it appears to have been the basis for *National League of Cities v. Usery*, 426 U.S. 833 (1976).

Justice Marshall carefully notes in his *Bolden* dissent that only the four Justices in the plurality agree that the discriminatory motive test is properly applied to the fifteenth amendment. 100 S. Ct. 1490, 1531 n.24 (1980). Perhaps the fifteenth amendment will enjoy a revival similar to that of the tenth amendment. See text accompanying notes 116-118 *infra*.

34. See, e.g., *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2798 (1980) (Stewart, J., dissenting with Rehnquist, J.) ("[T]he Constitution is wholly neutral in forbidding racial discrimination."); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274-79 (1979) (Stewart, J.) (absolute preference for veterans valid since not "inherently non-neutral"); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) (Stevens, J.) (fundamental principle of equal

*Bolden*, Justice Stewart has the opportunity to merge the Ahistorical Stance and the Neutral Pose. He does so with devastating effect.

The point of the comparison of the Court's reasoning in *Bolden* to themes in "Casablanca" is not to suggest that *Bolden* is an easy case.<sup>35</sup> Our constitutional system has not resolved central issues of what exactly is meant by "a substantive right to participate in elections on an equal basis with other qualified voters."<sup>36</sup> We tend to depend upon that very lack of resolution when we start thumping the tub about equal opportunity. We also lack any principled answer to the dilemma of where on a continuum from virtual representation to actual representation we believe our representatives should be.<sup>37</sup>

Jesse Choper makes a substantial contribution to our practical understanding of virtual representation in the context of federalism and judicial review. John Ely offers a powerful theoretical treatment of the evolution of a constitutional approach toward actual representation. Neither scholar purports to resolve all the basic problems of democratic theory he addresses, however, and it is no surprise that the court has trouble with such issues posed in a case such as *Bolden*. *Bolden* affords "the teachers in a great national seminar"<sup>38</sup> a tricky pop quiz about the appropriate direction for our system of democracy and our theory of representation. But the exam is in essay form, and the Court fails. It fails not so much for the answer it gives, as for the way it answers.

Justice Stewart's plurality opinion may be a mask for Our Federalism Redux.<sup>39</sup> It may be an indication of judicial restraint premised on judicial

protection that State govern impartially); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (Stevens, J.) ("absolute neutrality" the essence of first amendment rule which prohibits regulation of communication by content).

35. The concept of equal voting rights is not self-defining, as the *White Primary Cases* make clear. The problem of how to tell when a racial minority is frozen out of the political process to the extent that we can properly identify a constitutional violation is not simple. See section II, (C) *infra*. By no means do I intend to suggest that the problem of long-term institutional bias and dilution of the minority vote is unique to Mobile, to Alabama or to the South. It would be foolhardy for anyone who has spent time in Boston to make such a claim.

The recent troubled history of Boston's public schools is but the most vivid reminder that blacks often lack political clout in the urban North and that at-large election systems exist and harm blacks there, too. See *Owen v. School Committee of Boston*, 304 F. Supp. 1327 (D. Mass. 1969) (unsuccessful challenge to at-large School Committee election scheme in Boston); *Black Voters v. McDonough*, 421 F. Supp. 165 (D. Mass. 1976), *aff'd* 565 F.2d 1 (1st Cir. 1977) (similar attack on same system rejected; although "close question" and remand for continuing jurisdiction); See also S. SCHULTZ, *THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS 1789-1860* (1973); Fox, *Discrimination and Antidiscrimination in Massachusetts Law*, 44 B.U. L. REV. 30 (1964).

For a finding of public school segregation in Boston by the purposeful actions of the School Committee, see *Morgan v. Hennigan*, 379 F. Supp. 410, 484 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). See also *District Attorney v. Watson*, \_\_\_ Mass. \_\_\_, Mass. Adv. Sh. 2231, 2252-53 (1980) (invalidation of the death penalty, including observation that racial discrimination is not confined to the South or any other region and that "the existence of racial prejudice in some persons in the Commonwealth of Massachusetts is a fact of which we take notice.") (majority opinion by Hennessey, C. J.).

36. *San Antonio School Ind. Dist. v. Rodriguez*, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring).

37. See generally J. ELY, *DEMOCRACY AND DISTRUST* 77-104 (1980); H. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). See also Greenberg, *Representation and the Isolation of South Carolina, 1776-1860*, 64 J. AM. HIST. 723 (1977).

38. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

39. For the evolution of Our Federalism as something of a meta-constitutional concept, see Younger v. Harris, 401 U.S. 37 (1971), and its multiple progeny, discussed in Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977). Justice Rehnquist, joined by Justice Stewart,

uncertainty. It was not long ago, however, that the Court recognized that case-by-case proof of discrimination was difficult if not impossible in the electoral context. It seemed obvious in 1966 that "an insidious and pervasive evil" had long skewed the democratic process.<sup>40</sup> For the 1980 Court, *Washington v. Davis* seems to be the beginning of history. The discovery of "the basic principle that only if there is purposeful discrimination can there be a violation of the equal protection clause of the fourteenth amendment"<sup>41</sup> has become the source of analysis of all claims of inequality, except for school desegregation, for which the clock apparently can be turned back to 1954.<sup>42</sup> Insulation from harsh historical realities now is combined with manipulation of single-causation analysis. This technique carries its practitioners far beyond what otherwise might be merely a mistaken but defensible result in a difficult case.

What is noteworthy about the plurality opinion, joined by that of Justice Stevens, is the suggestion of extreme deference to the status quo as the basic constitutional value in the coming decade. The powers that be will remain. Proof that some official is way out of bounds, and intentionally so at that, is required to get the attention of the Court.

#### A. *The Ahistorical Stance*

*Oh, Mama, can this really be the end?  
To be stuck inside of Mobile  
With the Memphis blues again.*<sup>43</sup>

No better illustration of the limited logic of the law is likely to be found than Justice Stewart's use of historical syllogisms in *Bolden*. They are breathtaking; they are Dada.

Determination of the appropriate weight to be assigned to our history of past racial discrimination is admittedly a difficult task. Comparison to Justice Holmes' skeptical view of the utility of history is revealing. Not even Holmes could make clear how long the "experience" he celebrated as essential had to age before it became the derelict dragon of "tradition."<sup>44</sup> Nor did Holmes explain fully why experience but not tradition was useful for predicting what a judge actually would do.<sup>45</sup>

Possibly Holmes meant merely to distinguish between the grand tradition of legal history writing, which he thought pernicious, and the pioneering

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certainly indicates constitutional doubts about federal regulation of state elections in his dissent in *City of Rome v. United States*, 100 S. Ct. 1548, 1577-85 (1980). Justice Powell expresses similar doubts, albeit to a more limited extent. *Id.* at 1574-77.

40. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

41. 100 S. Ct. 1490, 1499 (1980).

42. See e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

43. B. Dylan, "Memphis Blues Again." *Blonde on Blonde* Album.

44. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

45. *Id.* at 458, 461.

social sciences of his time, for which he had high hopes. More sober reflection led Holmes, as it leads most of us, to be less optimistic about law and about teleological notions generally.<sup>46</sup> Yet Holmes kept battling even when his doubt was profound. He believed history essential to discover how law comes to be what it is.<sup>47</sup>

By way of contrast, Justice Stewart appears not to have noted the difficulties. He neither doubts nor does battle. Instead, he embraces the Ahistorical Stance, in all its sterility, with an enthusiasm which is chilling. For example:

(1) In 1911, Mobile enacted an at-large voting pattern, which was part of a nationwide campaign against corruption in city government, and which is a pattern still employed "by literally thousands of municipalities and other local governmental units throughout the Nation."<sup>48</sup>

(2) In 1911, blacks did not vote in Alabama.

∴ The 1911 voting reform could not have been intended to discriminate on the basis of race.

If 1911 in isolation is *the* relevant slice of time, and if overt racially discriminatory intention on the part of the enactors of the electoral scheme is *the* key to any violation of the fourteenth or fifteenth amendments, Justice Stewart's logic is impeccable.

The answer to the historical disenfranchisement of the plaintiffs, and to the findings of intentional discrimination by lower court judges who are all too familiar with the history of racial discrimination in Alabama, is as follows:

But past discrimination cannot, *in the manner of original sin*, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proven in a given case.<sup>49</sup>

Like original intent,<sup>50</sup> even the original sin of racial discrimination is not what it once was in constitutional law. Racial discrimination in voting is probably as close to original constitutional sin as we now get.<sup>51</sup>

The notion that it should be constitutionally decisive that the 1911 scheme was technically, formally neutral as to race is not convincing. It is a version of neutrality akin to America's neutrality in the period of lend-lease

46. See, e.g., Hamilton, *On Dating Mr. Justice Holmes*, 9 U. CHI. L. REV. 1, 10, 15, 26-9 (1941); Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3 (1962) and 15 STAN. L. REV. 254 (1963).

47. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897). Holmes' continued belief in the importance of ideas despite his prized detachment, and his ambivalence about the proper uses of history, are reminiscent of Isaiah Berlin's elegant description of similar tensions in Tolstoy's thought. See *The Hedgehog and the Fox*, in I. BERLIN, *RUSSIAN THINKERS* 22-81 (1978).

48. 100 S. Ct. 1490, 1496 (1980). See also *id.* at 1502 n.17.

49. *Id.* at 1503 (emphasis added).

50. Compare, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) with Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978).

51. It is important not to revere the Framers' original intent to such an extent that we overlook the role played by the serpent of slavery in their Edenic structure.

prior to World War II. It is reminiscent of the ahistorical view, as it was deployed in defense of the doctrine of separate but equal. To consider the motivation of 1911 in isolation is to ignore the entire history of overt racial discrimination in voting, and nearly everything else, which produced and perpetuated the disenfranchisement of blacks before, during, and long after the 1911 slice-of-time.

One is reminded of the answer given by Charles Black to the claim that separate could be equal and that educational issues should be left to local authorities. Black's response rested "on the ground of history and of common knowledge about the facts of life."<sup>52</sup> We also "ought to exercise one of the sovereign prerogatives of philosophers, that of laughter,"<sup>53</sup> in reaction to the notion that Mobile's electoral scheme and political reality were neutral as to race in 1911, or that they somehow, at sometime, have become neutral since.

Justice Stewart's need to avoid condemnation of virtually all governmental action—since past racial discrimination taints the entire structure of our political and judicial systems—leads him to create an ultimate constitutional test which will reach virtually no discrimination. The evil eye which produces discrimination despite facial neutrality is generally less obvious and less potent today than it appeared to be in the nineteenth century; our officials have become more skilled at tailoring velvet gloves to hide uneven hands.<sup>54</sup> Instead of allowing trial courts to probe sophisticated forms of discriminatory motive, Justice Stewart creates a constitutional test which vigorously presumes good faith while it simultaneously assumes away history. Unless and until some public official slips badly and discloses an affirmative plot to discriminate, inertia appears adequate to purge past wrongs.

[W]here the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.<sup>55</sup>

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52. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

53. *Id.* at 427.

54. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.")

55. 100 S. Ct. 1490, 1501 (1980). The lower courts are scolded for their consideration of "other evidence" which did not specifically identify the state officials who were the perpetrators of discriminatory actions against the plaintiffs. *Id.* at 1503 n.20. It is somewhat ironic that in the most recent major school desegregation decisions, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) and *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979), it was Justice Stewart, joined by Chief Justice Burger, who emphasized "undiminished deference to the factual adjudication of the federal trial judges in cases such as these [desegregation suits], uniquely situated as those judges are to appraise the societal forces at work in the community where they sit." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 470 (1979)(separate opinion). But Justice Stewart does appear consistent in that opinion when he rejects the significance of the role of past discrimination in shaping current realities. *Id.* at 472-73.

Continuing effects of past racial discrimination will not suffice. Current patterns of racial inequality, resting on the bedrock of past discriminatory practice, are not enough.<sup>56</sup> That blacks in Mobile always have been defeated for office "does not work a constitutional deprivation."<sup>57</sup> The existence of discrimination in municipal services and employment may be acknowledged, but a constitutional remedy may come only in separate lawsuits. The current Court repeatedly has held that even proof of systemic failure does not translate into constitutional violations.<sup>58</sup> Though Mobile's at-large system was found to disadvantage blacks, and to have been continued despite awareness of that fact, such factors are not included in the Court's constitutional calibration so long as other minorities are also disadvantaged. The plurality believes that "[t]o hold otherwise would be to constitutionalize a theory of proportionate representation, which could not be easily cabined."<sup>59</sup>

The plurality's suggested choice between the claims of Mobile's black citizens and the theory of proportional representation presents a false dichotomy. The plaintiffs attack their continued exclusion from the levers of municipal power, based upon a system which excluded blacks entirely for decades. They object to practices found by lower courts to have been maintained despite obvious racially discriminatory impact. These black citizens do not claim an abstract right to proportional representation. Instead, their constitutional argument is directed against a political system which was based upon total racial exclusion, which has not been changed to ameliorate old patterns, and which still evidences consciousness of color and disregard for the concerns of black citizens. To exercise judicial deference to this particular form of *realpolitik* is to blame the victims of past wrongs, and to condone the current manifestations of past discrimination.

It is true that the problem of how long the sins of the past should carry a constitutional taint remains a profoundly difficult problem in constitutional theory. The very complexity of the inquiry involved helps to explain the

56. Justice Stewart uses a strategy of separating, and then minimizing, the aggregate factors found to prove discriminatory purpose in the lower courts. Justice White attacks the plurality's use of the technique:

By viewing each of the factors relied upon below in isolation, and ignoring the fact that racial bloc voting at the polls makes it impossible to elect a black commissioner under the at-large system, the plurality rejects the "totality of the circumstances" approach we endorsed in *White v. Regester*, *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, and leaves the courts below adrift on uncharted seas with respect to how to proceed on remand.

100 S. Ct. 1519 (1980)(White, J., dissenting) (citations omitted). This approach to the *facts* in the vote dilution context is similar to the Court's isolate-and-overcome approach to the *law* in a claim of total exclusion from the vote concerning the police power in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69-71 (1978).

57. 100 S. Ct. 1490, 1503 (1980).

58. *Id. See, e.g., Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974). *See* note 39 *supra*.

59. 100 S. Ct. 1490, 1506 n.26 (1980). One wonders whether the ironic echo of Archibald Cox—"Once loosed, the idea of Equality is not easily cabined," in Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966)—is intentional or not. Similarly, one must ponder the assertion by the plurality that "'historical and social factors' indicating that the group in question is without political influence" are "gauzy sociological considerations [which] have no constitutional basis." 100 S. Ct. 1490, 1504 n.22 (1980). What does this tell us about the current Court's view of the twentieth century's second most famous legal footnote, *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954)?

analytic disaster of school desegregation decisions over the past decade, culminating in the artificiality of the majority opinions in *Columbus Board of Education v. Penick*<sup>60</sup> and *Dayton Board of Education v. Brinkman*.<sup>61</sup> School desegregation cases seem to be *sui generis*. Education is the single realm in which the Court is still willing to concede that general past wrongs have not been righted by the passage of time and the absence of overwhelming proof of current, specific discriminatory motive.

Once in place, however, virtually any electoral system is defensible on all sorts of rational grounds. We are all familiar with permutations and combinations of defenses that include "the people's choice," "the legislature's acquiescence," "local control," "settled expectations," and the like. Further, there are the familiar and important institutional doubts about the nondemocratic and unaccountable character of judicial intervention. Finally, we know by now that the political thicket can become a slough<sup>62</sup> and even a tarpit.

Simple reliance on rationality in the Ahistorical Stance was captured by the late film director, Jean Renoir, who said, "You see, in this world, there is one awful thing, and that is that everyone has his reasons."<sup>63</sup>

Even defenders of slavery might have survived the ahistorical version of the discriminatory motive test. Initial justifications for slavery did not depend on race, and the defenders of slavery continued to justify it on grounds beyond or in addition to racial discrimination. Many of them seem to have believed those rationalizations. They thought their system provided the greatest good for the greatest number, and they claimed to be far more protective of the least-well-off members of society than was the system of wage slavery in the North.<sup>64</sup> The defenders of school segregation similarly convinced themselves and others that separate schooling was better schooling for all. For a long time it was widely assumed that the system of segregated schools was not based upon a racially discriminatory purpose.<sup>65</sup>

60. 443 U.S. 449 (1979).

61. 443 U.S. 526 (1979).

62. This was Justice White's variation on Justice Frankfurter's theme in *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973).

63. From "The Rules of Game" quoted in Renoir obituary, N.Y. Times, February 14, 1979, at D-19, col. 1.

64. See, e.g., J. ROARK, *MASTERS WITHOUT SLAVES* 72-74 (1977); W. TAYLOR, *CAVALIER & YANKEE* 145-224, 261-324 (1961); L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* 145-201 (1955); Donald, *The Proslavery Argument Reconsidered* 37 J. SO. HIST. 3 (1971); Greenberg, *Revolutionary Ideology and the Proslavery Argument: The Abolition of Slavery in Antebellum South Carolina*, 42 J. SO. HIST. 365 (1976). See generally the work of Eugene Genovese and David Brion Davis.

65. See generally R. KLUGER, *SIMPLE JUSTICE* (1975). The Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), delighted to rely upon the other than racially discriminatory basis found and sustained by the great Chief Justice Lemuel Shaw in *Roberts v. City of Boston*, 5 Cush. 198 (Mass. 1850). The Court in *Plessy* noted that the attack on separate-but-equal schooling was rejected "even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." 163 U.S. 537, 544 (1896). See L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 109-118 (1957). In *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899), Justice Harlan, writing for a unanimous Court, found no constitutional right violated when Augusta, Georgia closed its highly successful black high school. The Court accepted the argument that the matter was properly left to local control, so long as there was a rational basis for the school closing. Because the newly disenfranchised black population lacked sufficient clout, they and the Supreme Court were faced with an argument that the closing of the black high school, but not the white high school, was necessary to keep black elementary schools open. It was claimed that the closing actually served "the greatest

The Court itself discovered a host of good reasons not to intervene in challenges to the initial Southern disenfranchisement of black citizens between 1890 and 1910. During the period when Alabama, along with other Southern states, set about to deprive blacks of the vote they had gained during Reconstruction and "created the system of segregation and disenfranchisement,"<sup>66</sup> the Court found it important to defer to the local authorities. Justice Holmes led the way.<sup>67</sup> Black plaintiffs were remanded to the popular will in their states or to the discretion of Congress and the Executive. The Court played a prominent role in the creation of the disenfranchisement system through its early complicity with new legal restrictions on the franchise. As Professor J. Morgan Kousser put it in his description of the "Reactionary Revolution" of disenfranchisement:

[F]olkways became stateways, with all the psychological power of legality and the social power of enforceability now behind them. . . . After the revolutionary Southern legal changes, the segregated and disfranchised retained no hope and no allies. Most, at that time, were excluded from the suffrage by the *enforcement*, not the nonenforcement of the laws.<sup>68</sup>

The entire electoral "reform" of disenfranchisement was not defended in terms of discrimination. Rather it was claimed to be a way to ensure "the supremacy of virtue and intelligence" in the electorate, and was applauded as "a typically Progressive reform."<sup>69</sup> The legislation which permitted the alteration of city governance and elections in Alabama in 1911 was the culmination of the movement away from corrupt elections and towards what was thought to be cleaner, better politics.<sup>70</sup> Some whites, as well as virtually all black citizens, were the victims.

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good for the greatest number." Augusta Chronicle, March 25, 1898, quoted in Kousser, *Separate but not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. SO. HIST. 17, 32 (1980). The lawyers for the school board argued that it was necessary for the plaintiffs to demonstrate bad faith, *id.* at 37, and Justice Harlan and the unanimous Court agreed, 175 U.S. 528, 544-45 (1899).

66. S. HACKNEY, *POPULISM TO PROGRESSIVISM IN ALABAMA* xiii (1969). See generally C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2nd rev. ed., 1966).

67. See *Giles v. Harris*, 189 U.S. 475 (1903). The newly-arrived Justice from Massachusetts concentrated upon the enforcement problems of a decision that the Alabama Constitution of 1901 violated the federal constitution in its disenfranchisement of blacks. Because the claim was that "the great mass of the white population intends to keep the blacks from voting," *id.* at 488, the Court could not be of assistance since equity could provide no remedy, "[u]nless we are prepared to supervise the voting in that State by officers of the court." The plaintiffs were instructed that "relief from a great political wrong, if done . . . must be given by [the people of the State] or by the legislative and political department of the government of the United States." *Id.* Holmes also discussed general limits on the Court's equity powers. See also *Giles v. Teasley*, 193 U.S. 146 (1904); *Jones v. Montague*, 194 U.S. 147 (1904).

In light of this history, Justice White appears to overstate when he asserts, "The absence of official obstacles to registration, voting, and running for office heretofore has never been deemed to insulate an electoral system from attack under the Fourteenth Amendment." 100 S. Ct. 1490, 1518 (1980). The Court did recall *Giles v. Harris* for its restrictive view of equity power in *Rizzo v. Goode*, 423 U.S. 362, 378 (1976).

68. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS, 1880-1910* 262-64 (1974).

69. *Id.* at 265, quoting John B. Knox, the president of the 1901 Alabama Constitutional Convention, 260.

70. The scope of the change is lucidly demonstrated in a study of Birmingham, Alabama by C. V. HARRIS, *POLITICAL POWER IN BIRMINGHAM, 1871-1921* 56-58 (1977). Harris finds that in the 1870s, approximately 30 percent of the registered voters in Birmingham city elections were black; and in the 1880s, from 45 to 48 percent. The response was an all-white city primary in 1888, and a drive to disenfranchise which achieved virtually total success with the new 1901 Alabama Constitution. The city elections thereafter were concerned primarily with



It took a more legally realistic Court to recognize the insidious nature of good reasons—such as protection of veterans, and those with settled expectations, and those willing to put their money where their political interest was—and to invalidate the discretionary tests harshly administered to disenfranchise blacks and the nonconformist poor. That blacks were technically free to vote in regular elections was not thought to be an adequate constitutional defense in the *White Primary Cases*,<sup>71</sup> even when associations which claimed to be private asserted their own constitutional rights in the process of the exclusion of blacks from political power.

We have begun to hear disturbing echoes of the Court of a century ago. Again it has been judicially determined that it is time that blacks ceased to be special favorites of the law.<sup>72</sup> Once more we are told that blacks are perfectly capable of competing equally with their fellow citizens.<sup>73</sup> The country again seems tired of stories about past discrimination as it did a decade after the Civil War.<sup>74</sup> In the absence of personal feelings of guilt, there is a search for a return to normalcy. Tales of past discrimination sound as worn as the story of original sin. No one is to blame. Only when the Court is convinced by clear proof that an individual was discriminated against on the basis of race will it intervene.<sup>75</sup> The Constitution embraces faith in the fairness of our institutions, and the Court will not go behind that pleasing presumption. With resonance from the Court of the Gilded Age of the 1880s, the current Court reflects the Guilt-Free Age of the 1980s.

It would be most pleasant if we could ignore our own sins, to say nothing of the sins of our fathers and mothers. As we tend our gardens and enjoy our cafes, it would be comforting if we could know the law without looking backward. But past presences do intrude. Ilsa does get to Casablanca, and

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annexation, corruption, and prohibition of secular activities of all sorts. The change from an aldermanic to a city commissioner form of government, contemporaneous with the 1911 election change in Montgomery, was instituted and applauded as an "advanced step" in urban reform. *Id.* at 33. But Harris summarizes, "[T]he central thrust of several reforms was to place the blacks more firmly and efficiently under the discipline of economically-powerful white groups." *Id.* at 279.

71. The Court's invocation of the Constitution to move away from the technicalities and aggressive judicial restraints which shackled black voting in the cases discussed in note 67 *supra*, began in *Guinn v. United States*, 238 U.S. 347 (1915), and prevailed through *Terry v. Adams*, 345 U.S. 461 (1953). Justice Black's majority opinion in *Terry v. Adams* held, "It violates the Fifteenth Amendment for a state . . . to permit within its borders the use of any device that produces an equivalent of the [racially discriminatory] election." *Id.* at 469. In *Smith v. Allwright*, 321 U.S. 649, 664 (1944), the Court held that a state "endorses, adopts and enforces" discrimination in the vote by failing to regulate against it. *See also Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

72. Justice Bradley's words in the Civil Rights Cases, 109 U.S. 3, 25 (1883), were "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws." In 1978, Justice Powell's decisive opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), noted: "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.* at 295 (emphasis in original).

73. *See, e.g., Fullilove v. Klutznick*, 100 S. Ct. 2758, 2809 (1980) (Stevens, J., dissenting) (noted ever increasing demonstrations "that members of disadvantaged races are entirely capable not merely of competing on an equal basis, but also of excelling in the most demanding professions.")

74. *See generally* W. GILLETTE, *RETREAT FROM RECONSTRUCTION—1869–1879* (1979).

75. For an enlightening discussion, *see* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Decisions*, 62 MINN. L. REV. 1049 (1978).

Rick laments, "Of all the gin joints in all the towns in all the world, she walks into mine!"

The Ahistorical Stance lacks adequate foundation. Perhaps we do learn from our past mistakes. But it begins to seem that, at least in the context of racial discrimination and access to the levers of power in our society, we grow able to repeat our mistakes unerringly. This is surely history as tragic farce.

### B. *The Neutral Pose*

*They say in Harlan County  
There are no neutrals there.  
You either walk the picket line  
Or you scab for J. H. Blair.  
Which side are you on, boys,  
Which side are you on?*<sup>76</sup>

The constitutional search for discriminatory motive is a search for villains. When historical patterns are no longer relevant, the individual plaintiff must prove that a bad thing was done for a bad reason. Otherwise the Court will leave well enough alone. Unless it is convinced by proof far stronger than the standard of causation generally used in the common law,<sup>77</sup> the Court will presume that even unprincipled governmental officials are neutrals, entitled to judicial deference.

That assumption may make some sense in such areas as the never-neverland of standardized testing and job qualifications for public employment, for example.<sup>78</sup> As the test was first articulated in *Washington v. Davis*, discriminatory motive "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."<sup>79</sup> By the time the discriminatory motive test reached the suburbs of Chicago, however, a numerical demonstration<sup>80</sup> which appeared to be in the same ballpark with the classics of uncouth discriminatory motive, *Yick Wo v. Hopkins*<sup>81</sup> and *Gomillion v. Lightfoot*,<sup>82</sup> did not suffice. The Court nevertheless continued to claim that a set of figures that constituted a shock to the neutral judicial conscience would be sufficient.

76. Old union song.

77. See, e.g., HART & HONORÉ, CAUSATION AND THE LAW (1959); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42 (4th ed. 1971); Pound, *Causation*, 67 YALE L.J. 1 (1957).

78. See, e.g., The Guardians Ass'n of the New York City Police Dep't, Inc. v. Civil Service Comm'n, No. 80-7027 (2d Cir. July 31, 1980).

79. 426 U.S. 229, 242 (1976).

80. In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977), Justice Powell's majority opinion reaffirmed *Washington v. Davis*, while noting that a stark pattern might suffice to invalidate legislation which appears neutral on its face. A village with 64,000 residents, of whom 27 were blacks, was not such a stark pattern. *Id.* at 255.

81. 118 U.S. 356 (1886) (320 laundries, of which approximately 310 were constructed of wood; 75 percent had Chinese owners. Over 150 of the 240 Chinese owners arrested; none of the approximately 80 remaining white owners of wooden laundries arrested.)

82. 364 U.S. 339, 341 (1960) (uncouth twenty-eight-sided figure was "tantamount . . . to a mathematical demonstration" that the Alabama law redefining boundaries of Tuskegee was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town.") For a discussion of the relative appeal of fourteenth and fifteenth amendment motive analysis in this context, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1222-24 (1970).

The constitutional test changed drastically in *Personnel Administrator of Massachusetts v. Feeney*.<sup>83</sup> Suddenly the discriminatory motive test of a multifactored universe was transmogrified into the world of the binary choice. Justice Stewart asserted for the Court: "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not."<sup>84</sup> The Court conceded in *Feeney* that the law which gave veterans an absolute preference was not neutral by design. The law was not specifically aimed at women, however, and it hurt lots of men.<sup>85</sup> Therefore, the merit selection technique—which guaranteed for all practical purposes that the plaintiff, who consistently scored high on civil service examinations, would never get jobs for which she tested—was held not to be an invidious discrimination. The Court refused to get involved. It would not consider the historical exclusion of "women's work" jobs from the Massachusetts statutory scheme. The foreclosing of veteran status to women through the sex classification system of the federal military was beyond the scope of the case. The chance that the Massachusetts system might "give the veteran more than a square deal"<sup>86</sup> was not of constitutional moment. The Court remained neutral, far above the battle between women and veterans for the fixed pie of government employment.

As argued convincingly a decade ago by John Ely and Paul Brest, and as refined in more recent scholarship,<sup>87</sup> it makes sense that the Court should inquire as to discriminatory motive in official action. Discriminatory motive when discovered should be a sufficient basis for invalidation of the challenged governmental action. The plurality in *Bolden*, however, elevates the discriminatory motive search into a quixotic quest. It does this, ironically, in the context of the vote, and the claim by black citizens to have their role in the choice of representatives reinforced by resort to constitutional law. This is the realm in which Ely persuasively argues motive analysis is least appropriate.<sup>88</sup>

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83. 442 U.S. 256 (1979).

84. *Id.* at 277.

85. *Id.* at 275. This factor of spreading the harm was central to the concurrence of Justices White and Stevens. *Id.* at 281.

86. *Id.* at 280-81.

87. See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978); and, particularly, Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

88. Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160-61 (1978), quoted by Justice Marshall in his *Bolden* dissent, 100 S. Ct. 1519, 1529 n.21. (1980). Justice Marshall also assembles an impressive array of empirical studies to the effect that multi-member districting greatly enhances the ability of the majority to elect all the representatives of the district. *Id.* at 1520-21 n.3. James Madison in particular, and the members of the Constitutional Convention in general, spent a good deal of time discussing the implication of their awareness concerning the direct relationship between size and representation in government. My colleague, John Leubsdorf, suggests that there may be particular features of urban politics—for example, nonpartisan election and no external voters with whom to bargain—that exacerbate the difficulties for minorities who are excluded by something like racial bloc voting, as found in Mobile. The Fifth Circuit termed this problem to be one of "majoritarian monopoly," *Wallace v. House*, 515 F.2d 619, 627 (5th Cir. 1975), vacated and remanded, 425 U.S. 947 (1976).

Though propounded in the name of sensitivity to local authority, a rigid approach to discriminatory motive compels plaintiffs to file interrogatories and to seek witness-stand confessions from the town fathers and mothers as to their specific reasons<sup>89</sup> for a particular course of action undertaken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

The basis for this discriminatory motive approach appears to be a bizarre combination of purported neutralities. Across a wide and broadening front, the Court proclaims neutrality as the greatest good for government. From first amendment theory through equal protection analysis, some sort of benevolent neutrality is constitutionally compelled.<sup>90</sup> Simultaneously, the Court has come to view itself as something of a benignly neglectful neutral functionary, high above the real life battle. The exclusive focus on "a given case" to resolve what Justice Stewart terms "the ultimate question" of discriminatory motive is a thin covering for constitutional satisfaction with what already is in place. This is preeminently so in any challenge to the existing political system. Politicians are notorious for their close scrutiny of how any change might affect the allocation of power. They display scrupulous concern for whose ox is gored in any realignment of existing arrangements. It is this reality which makes the recent constitutionalization of the two-party system appalling.<sup>91</sup> That elected officials consider and appeal to distinct racial and ethnic groups has been obvious throughout our history. In *Bolden*, however, enthusiastic deference to the institutional status quo is combined with an unwillingness to contemplate past wrongs. The neutrality which results rests on policy rather than on history. Strict construction of a bad motive test derived from *Washington v. Davis* transforms that decision's defensible constitutional innovation into a dangerous doctrinal straitjacket. It is as if Holmes' insight about the bad man as the focus of the common law were transformed into the necessary trigger for constitutional adjudication of racial claims.

The Court may believe that its repeated assertions of neutrality themselves constitute a neutral principle. But there is no principle in an approach which insulates past wrongs from constitutional scrutiny if they are big enough and last for a long enough time. Neutral principles may be enjoying a minor renaissance,<sup>92</sup> but they remain something everybody talks about but

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89. See, e.g., Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978).

90. See note 34 *supra*. See also *Reeves, Inc. v. Stake*, 100 S. Ct. 2271, 2278-79 (1980) ("Evenhandedness" principle supports giving state same treatment as would be accorded private businesses in allowing priority for state citizens); *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979) ("neutral principles of law" approach approved for resolution of church property dispute following schism); *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970) (church property tax exemption upheld as "benevolent neutrality" by government, based upon historic tradition).

91. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Storer v. Brown* 415 U.S. 724 (1974); *American Party of Tex. v. White*, 415 U.S. 767 (1974). But see *Elrod v. Burns*, 427 U.S. 347 (1976).

92. See Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 932 (1978). Actually, Professor Greenawalt's defense concedes away most, if not all, of the original claims made for neutral principles. *Id.* at 992, 1006-13. Max Weber suggested the general hunger for consistency and generality in law long before Herbert Wechsler frightened everyone by pointing out that consistency and generality were not to be found in the most significant decisions of the period. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). It has never been clear how one would know a neutral principle when

nobody seems able to do anything about. As hortatory statements about judicial workmanship, neutral principles are probably toothless. As constitutional doctrine, neutral principles turn out, paradoxically, to be akin to the colors black and white. We think we see them, but we never actually do.<sup>93</sup> As seeing is believing, believing is seeing. But neutral principles become a passive vise, which can squeeze all constitutional claims to extinction, when they are used to override history and to ignore present day reality.

There is a further anomaly in the current Court's suspicion about the appropriate role for numbers in constitutional analysis, which coincides with increasing demands for generality and consistency in the law. It used to be the case that, in claims of racial discrimination, "statistics often tell much and courts listen."<sup>94</sup> Jury cases, once the statistical archetype, are now generally cited for their restrictive language—*i.e.*, the individual defendant has no right to a specific jury array—rather than for their close scrutiny of any statistically unequal process that allowed the opportunity to discriminate.<sup>95</sup> Recent criticism by the Justices of "naked statistical evidence,"<sup>96</sup> and even of "the numerology" of one of the Brethren<sup>97</sup> signals that the current Court wants to be able to find an individual perpetrator to blame before it will concede that the Constitution permits judicial intervention.<sup>98</sup> The Court goes nearly to the opposite extreme, however, when the Justices believe they can point at Congress to escape the heat generated by nonneutrality. "Built-in headwinds,"<sup>99</sup>

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one saw it. Cf. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

93. Like absolute zero, which is unachievable, we never really see black (the total absence of color) nor white (the presence of the entire spectrum of colors). See N.Y. Times, §C-1, col. 1, January 15, 1980. Things are as clear as black and white only to a degree. Compare Ladd-Franklin, *The Uniqueness of the Blackness Sensation*, in COLOUR AND COLOUR THEORIES 211-12 (1929), (reissued 1973), with Neifeld, *The Ladd-Franklin Theory of the Black Sensation*, *id.* at 241-46. See also Browne, "The Absolute Truth—And Other Ambiguities," N.Y. Times, April 8, 1980, § C, at 3, col. 1.

94. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962). See, e.g., *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970). But see *Swain v. Alabama*, 380 U.S. 202 (1965). One recent decision which appears to fit the old pattern is *Castaneda v. Partida*, 430 U.S. 482 (1977). The peculiar fact pattern, the narrowness of the majority vote, and the vehemence of the dissent make *Castaneda* appear to be somewhat unusual. It is interesting that, in apparent contrast with their views on voting patterns, Justices Powell, Rehnquist, and Chief Justice Burger assume in their dissent in *Castaneda* that "the premise that underlies the cases recognizing that the criminal defendant has a personal right under the Fourteenth Amendment not to have members of his own class excluded from jury service" is "[t]hat individuals are more likely to discriminate in favor of, than against, those who share their own identifiable attributes." *Id.* at 515. These three Justices apparently either reject a similar premise of racial identification in the political context, or they regard it as constitutionally insignificant when they join in the plurality opinion in *Bolden*.

95. Jury cases remain distinct. The Court may have particular solicitude for the appearance of fairness in the judicial fact-finding process. Holmes similarly appeared to distinguish deference to political and economic realities, as in *Giles v. Harris*, 189 U.S. 475 (1903), and in his dissent in *Bailey v. Alabama*, 219 U.S. 231, 245 (1911) (would uphold peonage scheme as within Alabama's power to regulate contracts), from aggressive intervention when he believed the judicial process was threatened. See, e.g., *Moore v. Dempsey*, 261 U.S. 86 (1923); *Frank v. Mangum*, 237 U.S. 309, 345 (1915)(dissenting opinion).

96. *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972). See also *Craig v. Boren*, 429 U.S. 190 (1976).

97. *Ballew v. Georgia*, 435 U.S. 223, 246 (1977)(Powell, J., dissenting with Burger, C. J. and Rehnquist, J.).

98. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Decisions*, 62 MINN. L. REV. 1049, 1052-57 (1978).

99. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). For a similar approach in the context of the Voting Rights Act of 1965, see the unanimous opinion written by Justice Harlan in *Gaston County v. United States*, 395 U.S. 285 (1969).

demonstrated via statistics, afford sufficient evidence for judicial activism based on statutory authorization. But built-in hurricanes, demonstrated statistically, will not suffice in constitutional analysis. Perhaps it was the regression analysis used in *Bolden*, and relied upon by the lower courts as part of the "aggregate proof" of discriminatory motive in *Mobile*, that most frightened the Justices.

It is more probable that their reaction was against the conclusion of the lower court judges that purposeful inaction<sup>100</sup> by state and local authorities—in the face of a pattern of past racial discrimination and its powerful continuing effects—could constitute sufficient discriminatory motive to meet the requirement of *Washington v. Davis*. The general orientation towards acceptance of whatever is already in place by the current Justices, whose average age makes this the third oldest Court ever,<sup>101</sup> helps to explain the delights of a neutral approach to the world as it passes below their Olympian porch.

The Court exacerbates the problem with its glib response to the perplexing philosopher's problem of how to evaluate omissions in comparison to acts.<sup>102</sup> For the current Court, only bad actions count. The failure to act—"the arbitrary quality of thoughtlessness"<sup>103</sup>—is constitutionally irrelevant, a relic of an earlier age. Only when the Court can identify a culprit, and then apparently only by proof akin to that required in a criminal context, will constitutional scrutiny be triggered. The lower courts believed it significant that those in control in *Mobile* failed to act, though they were aware of the problem of inequality in voting. They also emphasized what was at best only an unarticulated interest that Alabama and *Mobile* could assert in defense of the particular existing electoral scheme.<sup>104</sup> In rejecting the aggregate approach, and the relevance of inaction, the plurality in effect limited the constitutional inquiry to a search for a smoking gun.

Consensus constitutionalism is the order of the day. The system works. Time will heal wounds and reward those who wait. In the long run, the victims of past discrimination are absorbed and should be contented. This is the land

100. 423 F. Supp. 384, 389-92, 398 (S.D. Ala. 1976); 571 F.2d 238, 246 (5th Cir. 1978).

101. See Blaustein & Mersky, *Average Age and Length of Service, Chart III*, in *The Statistics of the Supreme Court*, in IV FRIEDMAN & ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT* (1969). The current Court is moving up quickly on the "Nine Old Men" of the mid-1930s and the Taney Court on the eve of the Civil War.

102. See, e.g., C. FRIED, *RIGHT AND WRONG* 19, 51-2, 201-07 (1978), and sources cited therein.

103. *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C.Cir. 1969), *further relief ordered*, 320 F. Supp. 409 (1970), 320 F. Supp. 720 (1970), 327 F. Supp. 844 (1971), *order denying plaintiffs' motion to hold the defendants in contempt*, No. 82-66 (D.D.C. February 17, 1973). For a critical analysis, see D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 106-170 (1977).

104. The lower courts found Alabama to be without any particular reason for a preference among different forms of municipal government. See 423 F. Supp. 384, 393 (S.D. Ala. 1976) ("There is no clear cut State policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole . . . . [M]anifest policy of the City of *Mobile* has been to have at-large or multi-member districts"); 571 F.2d 238, 246 (5th Cir. 1978) (district court's findings not clearly erroneous and conclusion of vote dilution "amply supported by its findings.")

of equal opportunity; since we all get a fair start, the Court must merely assure that the race of life is fairly run.

The powerful union of the Ahistorical Stance and the Neutral Pose, demonstrated in the plurality opinion in *Bolden*, suggests that John Ely's representation-reinforcing theory has become much more hopeful than descriptive. *Bolden* also suggests that the current Court has little theoretical sense of what it is about or when and why it should intervene. The Court finds it easy to strip cases of their "voting rights attire."<sup>105</sup> Without a theory but with a complacent faith in virtual representation and general fair play, the Court surrenders us to the harsh realities of Casablanca or the Cosmos. The denouement may be tragic; but the Court appears content, so long as it can avoid a Happy Ending which is not fully explained.

### C. *The Unexplained Happy Ending*

*The answer to the question is  
the question is the answer, too.*<sup>106</sup>

The Court in *Bolden* is scrupulous to avoid an ending which lacks a fully developed theoretical explanation. Fearful of the slippery slope once the notion of political claims by minority groups is loosed on the constitutional landscape, the plurality mischaracterizes Justice Marshall's dissent as a plea for "a constitutional guarantee of proportional representation."<sup>107</sup> In the absence of a full-blown theory akin to the elusive and mythical neutral principle, a majority of the Court equates blacks with all other potential group claimants for purposes of constitutional analysis of their claim to political equality.

Since the Court lacks a technique to discover who is worst off—there is no constitutional equivalent to the applause meter on the old "Queen For A Day" program—the Justices seem compelled to assume that we are all equally well off. This avoidance technique allows the Court to transcend the muddle of equal protection decisions about who should receive the constitutional means to be transported out of the world of deference to the powers-that-are, and into the charmed circle of constitutional rights that should be.

Albert Einstein once said, "It is the theory which tells us what we can observe."<sup>108</sup> A paradox of relativity lurks within this insight. We need a theory, but we also must be able to see. It will not do to assume that the constitutional task is simply to treat those similarly situated the same way.<sup>109</sup> The question of who is in fact similar is very much a function of what lens we

105. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 70 (1978).

106. Lines from a song heard at a 1972 bluegrass concert in Vermont.

107. 100 S. Ct. 1490, 1506 (1980).

108. Einstein is quoted in D. BELL, *COMING OF THE POST-INDUSTRIAL SOCIETY* 9 (1973).

109. *Trimble v. Gordon*, 430 U.S. 762, 780 (1977)(Rehnquist, J., dissenting).

use.<sup>110</sup> The crux of the Court's failure in *Bolden* lies in its assumption that a complete theory is both necessary and sufficient for constitutional intervention by the Court.

Such an approach would preclude the results reached in *Brown v. Board of Education*,<sup>111</sup> *Shelley v. Kraemer*,<sup>112</sup> and *Smith v. Allwright*,<sup>113</sup> to cite but a few examples. We never have found out precisely what the right and its implications were in *Brown*, or where they come from—although apparently members of school boards in Ohio should have known in 1954 that whatever right it was, its discovery tolled for them.<sup>114</sup> If the Court will not get involved when cases include "unknown and perhaps unknowable factors,"<sup>115</sup> and if the Court believes inertia is properly embraced if the theories presented to it are incomplete and relativistic, then we are simply remanded to the powerful and the wealthy and to a feckless struggle to survive.

It is the task of the constitutional law professoriate to supply the tentative theories and to point to the realities. We do so though we know it is romance we are writing. That we cannot explain single causation or supply the conclusive proper ending does not undermine our ability to distinguish between what works and what does not, what makes sense and what is nonsense.

For example, it is not possible to claim that "Casablanca" has *the* right ending. But we do know that "it would be wrong" if Rick fell in love with Laszlo and the two of them took off together, leaving Ilsa to find her moorings on the Casablanca tarmac. It is also obvious that the ending would not be right if we discovered that the Nazis had called ahead to the control tower before they rushed to the airport, so that no one escaped Casablanca.

In constitutional law, the professoriate indulges in an activity akin to that of the mainstream of recent literary criticism, by which I do not mean deconstruction, despite appearances to the contrary. We practice hermeneutics without a license. For example, we do not have and are not given a general theory by the text of the first amendment; but we have the invaluable work of the likes of Professors Chafee and Emerson, Blasi and Baker to move us toward understanding. Professors tenBroek, Black, Ely, Brest, Wasserstrom, Karst, Fiss, Perry, and O'Fallon are but a few of the scholars who have advanced our awareness of why a Court should attach an antidiscrimination finale to its opinions.

I suggest a particular theory, grounded in constitutional language and history, that I believe supplies the best explanation for the ending lacking in

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110. The opticians and optometrists, for example, have expended great time and litigation expense, only to prove the point. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Cf., *Friedman v. Rogers*, 440 U.S. 1 (1979). See generally the works of Walker Percy, both novelistic and philosophical, concerning lenses and perceptions, and the discussion of Percy's work in R. COLES, *WALKER PERCY: AN AMERICAN SEARCH* (1978).

111. 347 U.S. 483 (1954).

112. 334 U.S. 1 (1948).

113. 321 U.S. 649 (1944).

114. See notes 60-61 *supra*.

115. *Milliken v. Bradley*, 418 U.S. 717, 756 n.2 (1974)(Stewart, J., concurring).



*Bolden*. It is based on the fifteenth amendment. One can invoke the ghost of Justice Black, and his strict attention to text, to maintain that the fifteenth amendment has a great deal to say about black citizens and the franchise. The message was not "wholly negative," despite what Justice Stewart says.

The fifteenth amendment affirmatively proclaimed a right to vote, free of denial or abridgement based on race, color, or previous condition of servitude. The protection announced in the constitutional text applies to both the federal and state governments. The language of the amendment, particularly its declaration that the right to vote "shall not be denied *or abridged*," implies more than a shield against discrimination. It suggests an affirmative guarantee. That amendment was the culmination of a grand scheme, intended by the post-Civil War Congress to alter the constitutional order and to assure the humanitarian and political fruits of the bloody victory.<sup>116</sup> The details were not completely thought out and the ramifications were not entirely grasped. But men of the early Reconstruction Congresses intended to use law as an active agent of liberation. After initial hesitation, they sought to constitutionalize freedom to include a constitutional obligation to protect equality in the franchise.

As a matter of the ordinary meaning of language, today and a century ago, "abridgement" of a right implies the prior and complete existence of that right. We certainly use such logic with reference to the first amendment's ban on "abridging the freedom of speech." The difference between the two amendments is in the presumption that a right to free speech exists unless and until the government acts. The franchise is of a different nature. The right to vote depends upon a reciprocal relationship of the individual to his or her government. The importance of reciprocity, and the mutuality of allegiance and affirmative protection, were basic concepts in the political theory of the immediate post-Civil War period.<sup>117</sup> It is as clear as anything can be about the murky, dramatic, and confused time that the fifteenth amendment was primarily an attempt to constitutionalize the protection of the rights of blacks to vote freely and equally with whites.

The men of the Reconstruction Congresses, and the varied ratifiers of the amendments they proposed, may well have had self-centered political and economic ambitions in addition to benign notions of conserving and building upon their military victory.<sup>118</sup> But by the time the fifteenth amendment was

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116. See generally Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). See, e.g., *U.S. v. Given*, 25 F. Cas. 1324 (D. Del. 1873) (No. 15,210); *U.S. v. Hall*, 26 F. Cas. 79 (S.D. Alabama 1871) (No. 15,282).

117. Soifer, *supra* note 116, at 700-06. It was thought particularly important that blacks had fought and died with valor in the Union cause. For this allegiance they were owed a right to vote, as even a moderate such as Abraham Lincoln claimed for black veterans in Louisiana in his last public address. See H. HYMAN, *A MORE PERFECT UNION* 281 (2d ed. 1975). Cf. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311 (1979).

118. Compare W. GILLETTE, *THE RIGHT TO VOTE* (1969) with Cox & Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. SO. HIST. 303 (1967). See generally W. GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879* (1979); H. HYMAN, *A MORE PERFECT UNION* (2d ed. 1975).

ratified in 1870, it was clear that initial Northern opposition to full black equality in the franchise had been overcome. The ideal was that every male citizen would have equal political power with his vote. That hope may have betrayed painful naiveté about what we now take to be elementary realities of political science. Nevertheless, the imprecise but important aspiration of the time was that racial factors should no longer interfere with equal political power.

My view of the fifteenth amendment complements John Ely's suggestion about a combination of the guarantee clause of article IV with the equal protection clause.<sup>119</sup> Details of the symmetry I perceive, through differentiation of fifteenth amendment analysis from fourteenth amendment precedents, are beyond the scope of this essay. Discussion of a parallel interpretation of the nineteenth amendment, with results possibly somewhat different from those in Ely's approach to sex discrimination, is similarly unnecessary here.

My argument does suggest that Jesse Choper was premature in his declaration that the promise of the fifteenth amendment has been fulfilled.<sup>120</sup> I do not claim that black citizens should always win when they claim voting dilution or discrimination. Nor do I assert that the Justices should follow the election returns to the extent that they transform the impact of the black vote in presidential elections, or in urban areas for that matter, into a general theory of practical disenfranchisement.<sup>121</sup> Rather, as the Court itself recently noted, the determination of whether a minority group has been excluded from effective electoral participation involves "a blend of history and an intensely local appraisal of the design and impact of the [electoral scheme] in the light of past and present reality, political and otherwise."<sup>122</sup> It was just such a practical, historical, and cumulative approach that the lower courts adopted in *Bolden*.

My suggestion is that the Reconstruction Amendments together pose such a constitutional test. They impose an affirmative duty on a political system to guarantee access and responsiveness to racial minorities.

119. J. ELY, *DEMOCRACY AND DISTRUST* 116-25 (1980).

120. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 89 (1980).

121. See, e.g., Aberbach, *Power Consciousness: A Comparative Analysis*, 71 AM. POL. SCI. REV. 1544 (1977); Danigelis, *Black Political Participation in the United States: Some Recent Evidence*, 43 AM. SOC. REV. 756 (1978); Hamilton, *Voter Registration Drives and Turnout: A Report on the Harlem Electorate*, 92 POL. SCI. Q. 43 (1977). Goldberg, *Vote More, Get More?*, N.Y. Times, June 20, 1979, § A, at 23, Col. 1. But see Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972).

122. *White v. Regester*, 412 U.S. 755, 769-770 (1973). The *Bolden* plurality's mutilation of precedent, which is necessary to force cases which were about no such thing into the Procrustean discriminatory motive tableau, is illustrated by Justice Stewart's interpretation of *Wright v. Rockefeller*, 376 U.S. 52 (1964). That decision is said to indicate that a State is free to redraw political boundaries, absent discriminatory motive. The *Bolden* plurality quotes the Court in *Wright* at just the point where Justice White's majority opinion indicated that proof would be sufficient if it showed that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines." *Id.* at 56 (emphasis added), quoted at 100 S. Ct. 1490, 1498 (1980). Similarly, Justice Stewart cites *Whitcomb v. Chavis*, 403 U.S. 124 (1971) as if it supported his rigid requirement of proof of discriminatory motive. In fact, the passage he quotes states that a plaintiff must prove that a disputed plan was "conceived or operated [a] purposeful [device] to further racial discrimination." *Id.* at 149 (emphasis added), quoted at 100 S. Ct. 1490, 1502 (1980).

The framers and ratifiers of the fifteenth amendment did not intend to leave its guarantee entirely up to Congress to enforce. The sweep of congressional authority does not preempt judicial power and responsibility. In a properly presented case, the Court has an affirmative obligation since the enforcement clauses of the Civil War amendments were not intended to replace judicial review.<sup>123</sup> That an electoral scheme has been in place for a long time does not constitute a rationale sufficient to ignore its practical effect and its historical context.

In *Bolden*, practicality and the burden of history indicate that the political system of Mobile has continued much of the tone and the effects of past, pervasive racial discrimination. The black citizens of Mobile have not yet achieved the equality in the franchise they were guaranteed by the promise of the fifteenth amendment. The ordinary coalition-building and shifting factions of politics-as-usual, which tend to be the essence of our democratic theory, has been found to have failed consistently to represent and to respond to the black citizens of Mobile. As targets of a long-term pattern of racial discrimination, their claim is not like that of any general interest group. It does not open the floodgates of proportional representation. The fifteenth amendment speaks to their predicament. It disallows permanent political powerlessness on a racial basis. Its message should be heeded.

The constitutional revolution of the Second Constitution was tragically short-lived, and the Court played a significant part in that tragedy. If, for lack of a Complete Theory, the present Court shies away from happy endings altogether, the wages of past sins will be fearfully compounded.

We would like to know exactly why Rick put Victor Laszlo and Ilsa on that plane out of Casablanca, but we also know it is up to us to figure out the best answer, rather than *the answer*. The issue merits contemplation, beyond the glib response that the movie was finished that way, even though we sense its indeterminacy. It is similarly worthwhile to consider, to create, and to argue constitutional theory, even after the realists destroyed any hopes of discovery. We are left largely to our own esthetics, and our existential leaps.

This does not mean that anything and everything goes, of course. Constitutional law demands both craftsmanship and imagination. Text and history supply the touchstone, but no philosopher's stone. It remains necessary to overcome hypertrophy of the critical senses,<sup>124</sup> the law professor's occupational disease. Ely and Choper suggest the possibilities. Constitutional law requires a sense that the way things are, and even the way they were, is not the way they should be.

To settle for the constitutionalization of the status quo is to bequeath a petrified forest. It is to fail to do justice in the constitutional quest.

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123. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347, 363 (1915).

124. See Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 403 (1971).

